UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

APPALACHIAN REGIONAL HEALTHCARE, INC.

Employer

and Case 9-UC-119730

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC

Petitioner

UNION'S BRIEF OPPOSING REVIEW

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The Petitioner (also referred to herein as the Union), by counsel, submits the following brief opposing the Employer's Request for Review.

I. PROCEDURAL BACKGROUND

The Employer's Post-Hearing Brief to the Regional Director concluded with a single request, that the "Union's amended petition for unit clarification should be denied." The Regional Director then dismissed the petition, refusing to clarify the unit. The Employer achieved the result it desired. Its Request for Review should be denied for that reason, in addition to the fact that the Request fails to meet the criteria supporting review under Section 102.67(c) of the Board's Rules and Regulations. Instead, the Employer presents its entire case to the Board and wants a new decision maker on all points. The Employer's request fails under Section 102.67(c) and should be denied.

II. INTRODUCTION

The parties' collective bargaining agreement ("CBA") has covered LPN and clerical positions, including medical assistants, at the Southern West Virginia Clinic ("SWVC"), located

at 250 Stanaford Road, Beckley, West Virginia, for many years. That clinic houses many different physician specialties, and has included primary family care in the past. After the last primary care doctor at SWVC departed in 2012, ARH filled that void with an existing practice belonging to Doctors Wisman and McNeel. Those doctors moved into the SWVC and became ARH employees.

However, Wisman and McNeel wished to keep their own staff. ARH devised a way to circumvent the posting requirements of the CBA by claiming that their practice is a separate "business entity" not subject to the CBA. There are now five employees (LPNs and medical assistants) working for Wisman/McNeel who were hired as non-union employees. Four of those employees were previously employed by Wisman/McNeel.

The Employer denied the resulting grievance, claiming the dispute is not covered by the grievance procedure but is one of representation for the NRLB to decide. Accordingly, the Local petitioned for unit clarification, understanding that a "single employer" debate and possible accretion would ensue based on the Employer's representations that the Wisman/McNeel staff work for a different employer.

However, it became extremely clear at the January 8, 2014 hearing that Wisman, McNeel and their staff members are all ARH employees. It is equally clear that there is no "separate business entity" covering the doctors' practice. Thus, the Petitioner argued in its post-hearing brief that its petition should result, not in accretion, but rather a clarification that the five positions are covered by the CBA and already included in the bargaining unit.

ARH argues that they do not belong to the bargaining unit, but that if they do they should be added by accretion. Such a ruling would do nothing but reward ARH for its conduct. It claimed these positions were not ARH positions in order to avoid the CBA so it could hand

select employees for the positions. An accretion order that the employees are now part of the unit would have the same effect and ARH would have accomplished its goal at the expense of other union members who could have applied for those positions.

ARH argues that the CBA's recognition clause only includes employees who are staff members of a particular group of doctors, not all employees located in a particular facility. The Union disputes that claim; there is no evidence that the parties ever intended to allow ARH to exclude covered positions from the unit by merely assigning them to a newly created department. Moreover, ARH is unable to show any meaningful distinction between Doctors Wisman and McNeel when compared to other ARH-employed doctors at the clinic.

III. FACTS

A. Relevant Contract Provisions

i. Article 3 - Recognition Of The Union

> **Section A.** ARH voluntarily recognizes the Union as the sole and exclusive collective bargaining representative for the Employees, as hereinafter defined, of ARH at its nine (9) regional hospitals: **Local 14310 (Beckley ARH, Beckley ARH Home Health Agency, Beckley Home Care Store, Beckley Medical Associates (f/k/a Southern West Virginia Clinic), Beckley, WV; Man Home Health, Kistler, WV; Hinton Home Care Store, Hinton WV);** local 14398 (Williamson ARH, Tug Valley Medical Associates, Tug Valley Medical Mall, Central Services of Pharmacy, Purchasing, and Laundry, South Williamson, KY, Home Health Agency, Home Care Store, and Regional Distribution Center, Belfry, KY); Local 14636 (McDowell ARH, ARH Professional Services Clinic, ARH Family Care Clinic-Wheelwright, ARH Family Care Clinic-Wayland and McDowell Home Health Agency & McDowell Home Care Store, McDowell, KY, Pikeville Home Care Store, Pikeville, KY); Local 14637 (Hazard ARH Regional Medical Center, Psychiatric Center, Hazard Home Health Agency, Hazard Home Care Store, Home Health Headquarters, Family Health Services – OB, Surgical,

> Prime Time Clinic, Cancer Center, Medical Mall and System Center, Hazard, KY; Local 14568 (Whitesburg ARH, Whitesburg Home Health Agency, Whitesburg ARH Clinic, ARH Home Care Store, Whitesburg, KY; ARH Central Billing, Jenkins, KY); Local 14491 (Harlan ARH, ARH Medical Associates, Harlan Billing and Transcription Services, Harlan Home Health Agency & Home Care Store, Harlan, KY; ARH Tri-City Medical Center, Cumberland, KY); Local 14628 (Middlesboro ARH, Women's and Family Health Center, ARH Family Practice Clinic, ARH Middlesboro Clinic, Middlesboro Home Health Agency & Home Care Stores, ARH Outpatient Pharmacy, Middlesboro ARH Clinic, Middlesboro, KY, Dr. Michael Ukaegbu and Dr. Christopher Steidle); Local 9148 (Morgan County ARH, ARH Morgan County Clinic, Morgan County Home Health Agency, West Liberty Home Care Store, West Liberty, KY; ARH Cash Posting); and Local 14310-01 (Summers County ARH and ARH Summers County Clinic – Hinton, WV) with respect to rates of pay, hours of work and other conditions of employment.

[The Employer fails to mention any of the following CBA provisions]

> **Section B.** The bargaining unit includes only the full-time and regularly employed part-time maintenance, service, LPN, clerical, and technical employees including those **at the locations listed in Section A**, and those listed in Appendix A and shall specifically exclude, among others, the following:
>
> - Physicians
> - Registered Nurses
> - Supervisory Personnel with authority to hire, discharge, promote, or discipline, or to recommend hiring, discharging, promotion or disciplining
> - Lexington Office Employees
> - Confidential Personnel
> - Administrative Personnel
> - Professional Personnel

(R. Ex. 3, emphasis added)[1].

[1] Respondent's (Employer's) Exhibit No. 3. Petitioner's exhibits are designated "P. Ex. 1," etc.

ii. Article 10 – Job Vacancy Notice

Section A. When a job vacancy develops in a job classification covered by this Agreement, ARH shall inform employees of such vacancy by posting notices on the Union bulletin board in the facilities concerned and electronically on the ARH careers website. The notice should contain the following information:

1. Job title
2. Job description
3. Rate of pay and grade
4. Department
5. Shift involved and the day anticipated that the position will be vacant.
6. Estimated work schedule for part-time employees.

Such posting shall remain for five (5) days before final selection of the applicant is made. At the time such posting is made, a copy thereof shall be delivered to the local union president. ARH may fill the position immediately pending final selection of the applicant.

Section D. In job grades 1-6 employees bidding a job, who meet the requirements of the job, will be awarded the job on the basis of seniority. Employees bidding a job in grades 7 or above who meet the requirements of the job (have the necessary training, education, experience, physical fitness and ability) shall be awarded the job on the basis of better qualifications. . . .

iii. Article 13 – Seniority

Section A. Bargaining Unit seniority is defined as the length of time an Employee has been continuously employed with a particular **facility** in a classification covered by this Agreement.

(R. Ex. 3, emphasis added).

B. The Appalachian Regional Healthcare System

Rocco Massey, the community CEO for Beckley ARH, testified that ARH includes a healthcare system operating 10 hospitals, 25 clinics, home health agencies and home care stores in Kentucky and West Virginia. (Tr. 23-24). ARH is a not-for-profit corporation with Joseph Grossman as its president and CEO. (Tr. 28-29).

The CBA's "Agreement" clause identifies one employer as party to the CBA – "Appalachian Regional Healthcare, Inc." Consistent with that, "Appalachian Regional Healthcare, Inc." is the sole employer signatory on the CBA with the Union (signed by Jerry Haynes, president and CEO at the time). (R. Ex. 3).

C. Southern West Virginia Clinic History

In 2001, SWVC employees organized; since then, ARH and the Union have been parties to successive CBAs that cover the SWVC. The CBA has always covered all ARH employees at that facility.[2] Wisman/McNeel were the first ARH doctors to bring over their own non-union staff to work in the facility. (Tr. 34, 258-59).

The CBA does not say, or otherwise indicate, that the term "Southern West Virginia Clinic" includes only certain ARH doctors at 250 Stanaford Road. Until now, ARH has never hired doctors at SWVC and attempted to claim that those doctors are not covered by the CBA. (Tr. 254-55).

Regarding the SWVC, Massey testified:

> Prior to 1995, a clinic which is adjacent to our hospital was known as the Southern West Virginia Clinic. That particular clinic housed in 1995 approximately 25 physicians. It was a private clinic, but it was owned by a clinic group. And in 1995, ARH purchased the Southern West Virginia Clinic.

(Tr. 32). There were no other physician groups practicing in the clinic when ARH purchased it. (Tr. 33). Massey testified that the physician group at the clinic had two name changes. It was first renamed "Beckley Medical Associates" and then became known as the "New ARH Southern West Virginia Clinic." (Tr. 39). Massey further testified:

> Q. And so it was re-established as the New ARH Southern West Virginia Clinic. Was that clinic located within the Southern West Virginia Clinic facility?

[2] I.e., it covers the employees included in the Recognition Clause.

A. Yes.

(Tr. 39). Massey then testified that the doctors identified on Employer's Exhibit 5 (in the purple blocked area) are the doctors now employed by ARH and associated with the "New ARH Southern West Virginia Clinic" and covered by the CBA. (Tr. 40).[3] He testified:

> Q. Does the Hospital draw a distinction between the practice group, ARH New -- the New ARH Southern West Virginia Clinic and the facility, Southern West Virginia Clinic?
>
> A. Yes. There is a definite distinction between them, between the two.

(Tr. 40). However, despite the Employer's testimony that ARH renamed the physician group the "New SWVC" in 2007, the CBA makes no mention of that group or that it covers only that group. (R. Ex. 3). The CBA only identifies "Beckley Medical Associates (f/k/a Southern West Virginia Clinic)" as the location covered. For clarity, herein, "SWVC" refers to the facility.

Contrary to the Employer's brief, there is no such facility named the "Southern West Virginia Clinic Building," (capitalizing "Building" as if that is an official designation). The Employer uses that designation no fewer than 35-40 times. Neither the CBA, nor the parties, have ever used such a designation to distinguish between that location and any particular physician group.

Employer's Exhibit 5, created for this litigation, purports to depict which SWVC departments have union employees. That exhibit incorrectly states that, aside from the Wisman/McNeel office, there are two other types of non-union offices in the clinic building. First, there are the "independent practices" in the clinic building, which belong to doctors who lease space from ARH (i.e., the doctors are ARH tenants and their offices do not include any ARH employees). The Union agrees with that assertion.

[3] Even though that Exhibit does not use the word "new."

The other alleged non-union department at the SWVC is the Rejuvenation Center. However, as Massey testified, the ARH Rejuvenation Center is non-union because there are only sales staff working there, and those positions are not covered by the CBA. (Tr. 44, 114; R. Ex. 3, Art. 3). Julie Hodge, ARH employee and former union president, clarified that, in fact, there are non-sales CMA employees[4] who work there who are union members. (Tr. 244).[5]

Thus, per the Employer's own chart, with the clarification made by Hodge, all ARH employees at 250 Stanaford Road are covered by the CBA, except those in the Wisman/McNeel office. There are three other clinics identified on Employer's Exhibit 5 (Beckley ARH Cardiology Associates, Surgical Associates and the Urology Clinic) that are not at SWVC/250 Stanaford Road; they are at different sites on Harper Road and not identified as union facilities in the CBA. (R. Ex. 3).

The Union does not claim that the Harper Road clinics should be subject to the CBA. There was no evidence that any of those clinics have ever been called "Southern West Virginia Clinic." The record shows that the Union objected to the non-union ARH employees within SWVC (i.e., the Wisman/McNeel staff) because that clinic is expressly identified as a union facility in the CBA. The CBA does not categorically cover all ARH employees in the Beckley, West Virginia geographic area. (R. Ex. 3).[6]

All doctors who have been employed by ARH at the SWVC since the SWVC was included in the bargaining unit have been staffed with union personnel. ARH cannot identify a

[4] Incorrectly transcribed in the hearing transcript as "EMA", which is not an employee classification. A CMA is a certified medical assistant identified in the wage table in the CBA.

[5] The disagreement between Massey and Hodge on this point is immaterial in that even Massey acknowledged there are no classifications that fall under the CBA at the Rejuvenation Center.

[6] Accordingly, the Employer's reliance upon the Harper Road clinics is misleading. If anything, those clinics demonstrate the Union's good faith and understanding that not all clinics are covered by the CBA. Otherwise, the clinics are not relevant to this matter.

single doctor employed by ARH at SWVC, since SWVC was included in the bargaining unit, whose office and staff have been excluded from the bargaining unit.

D. The CBA Identifies Facilities and Offices, Not Practice Groups.

The SWVC includes many doctors covering a variety of specialties, including cardiology, ENT, surgery, dermatology, thoracic surgery, and gynecology. (Tr. 49). Initially, Rocco Massey denied that, prior to Wisman/McNeel, SWVC employed primary care physicians. He later admitted that immediately before Wisman/McNeel were hired, Dr. Gunter, also a primary care doctor, worked for ARH at the SWVC. She left in 2012, before the arrival of Wisman/McNeel. Massey then acknowledged that Gunter's staff members were union members. (Tr. 97-100).

ARH introduced no facts supporting the claim that certain doctors or specialties are excluded from the CBA. The Union president for the past seven years, Willie Redden, testified:

> Q. Do you have an understanding of which ARH employees at 250 Stanaford Road are covered by the contract?
>
> A. Yes.
>
> Q. What is that understanding?
>
> A. Everybody in that facility at 250 Stanaford Road, that -- besides the one that leased.
>
> Q. Okay. So –
>
> A. Housekeeping, maintenance, EMAs, radiology, labs, everybody.
>
> Q. Has the Union ever bargained with the Employer to exclude particular ARH employees at that facility?
>
> A. No.
>
> Q. And so the record -- Has the Employer ever approached the Union and said, "Hey, we want to carve out some ARH employees and not have them covered by the contract at 250 Stanaford Road"?
>
> A. No.

(Tr. 258-59).

Julie Hodge, the Local president who bargained the initial CBA that included SWVC, testified:

> Q. BY MR. PARRISH: Ms. Hodge, getting back to recognition clause, Article 3, when you bargained that initial contract the medical associates group was at one and only one location, and that's 250 Stanaford Road; is that accurate?
>
> A. Yes.
>
> Q. Okay. And when it was renamed as the Southern West Virginia Clinic -- when the medical associates was renamed as the Southern West Virginia Clinic, that group of physicians was still at the physical site, 250 Stanaford Road; is that accurate?
>
> A. Yes.
>
> Q. And that physical site is also known as the Southern West Virginia Clinic; is that accurate?
>
> A. Yes.
>
> Q. All right. To your knowledge, has the Union ever bargained for anything but the inclusion of all ARH employees at 250 Stanaford Road?
>
> A. Ask me that one more time.
>
> * * *
>
> Q. BY MR. PARRISH: All right. What employees -- or strike that. What union members -- strike that. What ARH employees were included at the Southern West Virginia clinic that you bargained for?
>
> A. All of them.

(Tr. 254-55).

E. <u>The Hiring of Drs. Wisman and McNeel</u>

ARH's witnesses testified at length about how Doctors Wisman and McNeel did not want to lose their existing office staff. ARH openly admits that is the reason it "created" the separate

Beckley ARH Primary Care "entity." Rocco Massey testified that the Wisman/McNeel office was not staffed with union members because the doctors wanted to keep their own office staff:

> Q. Would anything stop you from making the clinic position [at Wisman/McNeel's office] at 250 Stanaford Road union?
>
> A. Yes.
>
> Q. What?
>
> A. The whole rationale. **You'll hear from the physicians, themselves, they wanted to keep their practice intact**, to exist as it did, just as we did these other yellow boxes [the other independent practices on Harper Road identified on R. Ex. 5] that are reflected here.

(Tr. 108-09, emphasis added).

Rocco Massey testified that Wisman, McNeel and other non-tenant doctors at the SWVC are ARH employees, unlike the doctors who lease space inside the clinic. (Tr. 92). In addition, ARH produced the employment contracts between ARH and Wisman/McNeel. (R. Exs. 9-10). Those agreements expressly state that "Appalachian Regional Healthcare, Inc." employs Wisman and McNeel. Consistent with the agreements, at the January 8, 2014 hearing ARH stipulated that it pays not only the two doctors, but also pays all five of the employees holding the contested positions. (Tr. 138).

The doctors' employment agreements also establish:

i. ARH maintains the right to discharge the doctors;

ii. ARH pays for the doctors' fringe benefits;

iii. ARH provides the doctors' health insurance;

iv. The doctors must provide certain types of services outlined in the agreement, including primary care services;

v. ARH maintains the "sole right to establish charges" for the doctors' services;

vi. ARH maintains the sole right to bill patients and third party payors, and to "collect those billings for its own accounts;"

vii. The doctors may not work for anyone else other than ARH;

viii. ARH pays for the doctors' malpractice insurance;

ix. All patient records belong to ARH;

x. ARH supplies the doctors with "space, equipment, supplies, and support personnel necessary for [the doctors] to perform the services in the sole discretion of ARH;

xi. The doctors must refer their patients to ARH for other care, as needed;

xii. The doctors may not practice within 50 miles of an ARH facility for two years after terminating the relationship;

xiii. The doctors must comply with ARH's policies, procedures, practice guidelines and patient care protocols;

xiv. The doctors report to the ARH CEO for Physician Services;

xv. The doctors' work schedules are "expected to equal or exceed the average for [their] specialty, will be in accordance with the normal ARH schedules for the Primary Practice Sites(s), and in no event shall be less than 40 hours per week;"

xvi. The doctors "will exercise clinical supervision of certain ARH support personnel assigned to Physician;"

xvii. The Physician will perform such administrative functions associated with or related to clinical practice and operation of the Primary Practice Sites as ARH may reasonably request from time to time;

xviii. The doctors must prepare "such reports" as required by ARH;

xix. ARH determines the amount of vacation the doctors can take, as well as other time off, such as funeral and sick leave;

xx. The doctors must dress and communicate with patients, staff, coworkers, visitors, etc., in a professional manner;

xxi. ARH makes the normal employee withholdings from the doctors' paychecks, and

xxii. The agreements contain "a full and complete expression of the rights and obligations of the parties."

(R. Exs. 9-10, emphasis added). ARH and the doctors signed the agreements.

Nothing in either doctor's contract even mentions Beckley ARH Primary Care Associates.

F. ARH Initially Posted The Two LPN Positions.

ARH initially posted two part-time LPN-Clinic positions for Wisman/McNeel pursuant to the CBA on or about April 8, 2013. (Tr. 263, 298; P. Ex. 5). Wisman/McNeel's office opened in late April/early May 2013. (Tr. 236). However, the postings were removed shortly after they were posted, before they could be signed by union members. ARH then filled those positions as non-union positions with members of Wisman/McNeel's pre-existing staff.

The postings identified Andrew Dye as the hiring manager. Dye has direct oversight over SWVC as the Assistant Administrator for all the operations and the practices within the ARH Southern West Virginia Clinic. (Tr. 117). After the postings were removed, Willie Redden, the Local Union president, spoke to Dye:

Q. Did you have any conversations with Mr. Dye regarding this posting after it was taken down?

A. I did.

Q. And tell us about that, please.

A. Actually, he was crossing the parking lot going to the Hospital, and I asked him how come they took the jobs down, and he said he wasn't -- He was told not to talk about it.

Q. Make sure you speak --

A. He was told not to talk about it, wasn't going to talk. And I asked him why he wasn't going to talk about it.

Q. So he refused to discuss it?

A. Correct.

(Tr. 264-65).

The LPN postings identified information about the positions, including:

i. The "facility name for posting" was "SWVC;"

ii. The hiring manager was Andrew Dye;

iii. The contact person for the postings was Sue Thomas, the Beckley ARH Human Resources Director, with a contact address of 306 Stanaford Road, which is the ARH Hospital (Tr. 298);

iv. The positions were Union positions, and

v. The positions were part time.

(P. Ex. 5).

G. <u>The Grievance Resulting From ARH's Removal of The Postings</u>

The Local grieved the Employer's refusal to recognize the positions as bargaining unit positions. (R. Ex. 17). That grievance led to an unfair labor practice charge by the Union after the Employer refused to arbitrate the dispute. (Tr. 265-66). That unfair labor practice charge is in abeyance pending the outcome of this unit clarification.

Responding to the grievance, ARH maintained that this dispute should be before the NLRB as a matter of representation because the LPN positions are not covered under the CBA. In a July 23, 2013 letter, ARH wrote:

[T]he two jobs in question are not covered under Article 3 – Recognition of the Union. These positions are part of a recently acquired physician practice that is operated by ARH as a separate business unit. As such, **Article 3 does not extend to this business entity.**

Although USW postures the issue in the grievance as one involving job posting, it is the position of ARH that the grievance actually concerns a matter of employee representation by USW. The positions are staffed by the same individuals who were employed by the acquired physician practice. Of course, these individuals were not represented by USW when the physician practice was acquired by ARH.

Employee representation issues are within the exclusive jurisdiction of the National Labor Relations Board. As such, the grievance and arbitration procedure of the parties' collective bargaining agreement (Article 33) is not the proper forum to resolve the issue.

* * *

To summarize, ARH will not agree to arbitrate this grievance because arbitration will not resolve the issue. The issue is not one that can be resolved by interpretation or application of the collective bargaining agreement. Rather, it involves application of statutory policy, standards and criteria.

(R. Ex. 17, emphasis added).

H. Facts Showing That "Beckley ARH Primary Care" Is, At Most, An ARH Department At SWVC

Rocco Massey testified that ownership and control of ARH and Beckley ARH "Primary Care" are identical:

Q. BY MR. PARRISH: The ownership of ARH and the other enterprises was raised a minute ago. We've got ARH Hospital. We've got ARH Clinic. The Employer is saying that Beckley ARH Primary Care is its own independent unit. All of those three are owned and operated by the same ARH not-for-profit corporation, true?

A. True.

Q. With the same board of governors, the same exact governance for all three, true?

A. True.

(Tr. 124).

ARH was served a subpoena duces tecum for the hearing requiring it to produce all such documents, including correspondence with Wisman/McNeel, "established in [sic. Should be "establishing"] a separate business or legal entity for Beckley ARH Primary Care." (Tr. 93). Massey confirmed that ARH had produced all such documents and that they were in evidence as exhibits:

> Q. BY MR. PARRISH: I'm handing what is the attachment to Andrew Dye's subpoena, and it requires a bunch of documents to be brought here. And, in particular, Number 8 -- I'm sorry, Number 10 says produce all documents established in ["establishing] a separate business or legal entity for Beckley ARH Primary Care. Right?
>
> A. Yes.

(Tr. 93).

> Q. . . . There are no other such documents creating a separate business entity for Beckley ARH Primary Care, right?
>
> A. If there were, they would be related to these three existing documents, which would -- I mean there's numerous documents we can still produce which relate to these three documents here.
>
> MR. SMITH: Okay, let me just jump in here. I was only aware -- I'm not aware of any other documents, other than the three that I gave you. If there are others, then I'm not aware of that, but we will get them and we will produce them.
>
> THE WITNESS: I guess my point is that these are -- these are the specific documents, these are the overlying documents. But there, you know, as I mentioned earlier, this is only a sample off this one particular report.
>
> HEARING OFFICER MURAROVA: And that is?
>
> Q. BY MR. PARRISH: And you are pointing to R-6?
>
> A. Yeah. I think I mentioned that in my earlier testimony that this was a sample.
>
> Q. All right. So you pointed to R-6 as indicia or evidence that Primary Care is a separate entity; is that right?

A. Yes.

Q. All right. So are you saying that there may be other documents in existence that indicate that Primary Care may be a separate entity, but there are no other documents that actually created another separate entity, true?

A. Yeah, that's true.

Q. Okay.

A. That's true. That's correct.

Q. So any other documents would simply be the offspring of the documents you have already marked as exhibits which ostensibly created a separate legal entity for Primary Care?

A. That is correct, yes.

(Tr. 94-96).

Q. BY MR. PARRISH: But, again, pursuant to the subpoena duces tecum, we have all the documents, the actual documents that went between Wisman, McNeel, and ARH to bring Wisman and McNeel on board?

A. Yes.

(Tr. 97). The exhibits show that there was no communication between ARH and Wisman/McNeel that even mentioned Beckley ARH Primary Care Associates. Moreover, there are no documents that show creation of a separate business or legal entity called Beckley ARH Primary Care Associates.

ARH only produced three documents which it claims show such an entity exists. Those documents, identified as Employer's Exhibits 6, 7 and 8, consist of one internal business document showing a specific ARH accounting code for Beckley ARH Primary Care, plus two internal emails regarding "setting up" Primary Care. Those documents show that ARH was, at most, setting Primary Care up as a separate accounting unit to track income and expenses, as it does with all specialties.

For instance, Massey testified:

Q. The clinic tracks the income of every practice specialty, doesn't it?

A. Yes.

Q. Okay. I mean gynecology, you count to the penny, gynecology, what their income is and what their expenses are, right?

A. Yes.

Q. Same thing with urology, radiology, all the different specialties or departments. You track income and expenses for all of that, right?

A. The ones that report to me, yes.

Q. Okay.

A. Radiology doesn't report to me.

Q. Okay. But the Hospital still tracks it. They just don't track it with you, right?

A. Correct.

(Tr. 194-95).

Consistent with the Wisman/McNeel employment contracts, the Employer's witnesses confirmed that Primary Care Associates was not autonomous.[7] For example:

i. The ARH human resources department processes employment applications and makes offers of employment for Wisman and McNeel, which is not something ARH does for the leasing doctors. (Tr. 194).

ii. The Wisman/McNeel office is completely integrated with the ARH billing system. ARH does the billing for that office, which it does not do for the leasing doctors. (Tr. 193).

[7] The long list of employment conditions in those contracts show that neither Wisman, McNeel, nor their practice, regardless of what it is called, is autonomous. To avoid repetition, all such facts will not be repeated here.

iii. The Wisman/McNeel office computer system for admitting patients is integrated with the ARH computer system. (Tr. 189).

iv. ARH provides all supplies to the Wisman/McNeel office. (Tr. 188).

v. The Wisman/McNeel office uses the same scheduling computer system as ARH, unlike the tenant doctors. (Tr. 188).

vi. Andrew Dye handles complaints about the Wisman/McNeel staff. (Tr. 181).

In addition, the ARH website states that "Beckley ARH Primary Care" ("Associates" is not mentioned) is located at 250 Stanaford Road, but that website makes no mention of SWVC or "New SWVC" at that address. The website indicates that ARH has designated the entire 250 Stanaford Road facility (containing mostly union employees) as Beckley ARH Primary Care. (P. Ex. 2).

However, the ARH website page specific to Dr. Wisman shows Wisman working at "Southern West Virginia Clinic." His web page does not mention Beckley ARH Primary Care. (P. Ex. 3).

Similarly, the picture of Dr. Wisman by the elevators in the ARH Hospital identifies Wisman as working at "Southern West Virginia Clinic." The picture does not mention Beckley ARH Primary Care. (P. Ex. 4).

Likewise, the brochure that ARH distributes at ARH facilities states that Dr. Wisman works at "ARH Southern West Virginia Clinic." The brochure identifies him as a "family practitioner" but does not mention Beckley Primary Care Associates. In the brochure picture, Wisman wears a lab coat stating "Appalachian Regional Healthcare." (R. Ex. 20).

Finally, Drs. Wisman and McNeel have their office in suite number 210 at the SWVC. The sign on their office door states, "A Department of ARH Hospital." The office door does not mention Beckley ARH Primary Care Associates. (P. Ex. 6).

I. Facts Regarding The Community of Interest Between The Wisman/McNeel Staff and Other SWVC Employees.

Petitioner will attempt to avoid unnecessary duplication here. Many of the facts regarding Beckley ARH Primary Care Associates have already been discussed and describe the integration between the Wisman/McNeel office and other parts of the SWVC.

i. The Five Positions At Issue

There are five positions at issue that ARH designated as non-union positions, including two LPN and three office assistant (a/k/a medical assistant) positions. They are held by:

> **Lisa Ballard** (LPN) – formerly worked for Wisman/McNeel and moved to ARH with the doctors. ARH hired her to work with Wisman/McNeel as an LPN-Clinic earning $13.62 per hour and reporting to Andrew Dye. Her offer of employment, which came from ARH New SWVC human resources, identifies her employer as "Appalachian Regional Healthcare." The offer states the position will be based in "Medical Associates." (R. Ex. 12; Tr. 112).
>
> **Azure Spain** (LPN) – formerly worked for Wisman/McNeel and moved to ARH with the doctors. ARH hired her to work with Wisman/McNeel as an LPN-Clinic earning $13.62 per hour. Her position reports to Andrew Dye. Her offer of employment, from ARH New SWVC human resources, identifies her employer as "Appalachian Regional Healthcare." The offer states the position will be based in "Medical Associates." (R. Ex. 15; Tr. 112).
>
> **Misty O'Neal** (office assistant) – formerly worked for Wisman/McNeel and moved to ARH with the doctors. ARH hired her to work with Wisman/McNeel as a Physician Office Assistant earning $12.50 per hour. Her position reports to Andrew Dye. Her offer of employment, from ARH New SWVC human resources, identifies her employer as "Appalachian Regional Healthcare." The offer states the position will be based in "Internal Medicine." (R. Ex. 14; Tr. 113).
>
> **Kaitlyn B. Bower** (office assistant) – formerly worked for Wisman/McNeel and hired in July 2013 to work in the Wisman/McNeel office. ARH hired her as a

"Physician Office Assistant," earning $12.50 per hour. Her position reports to Andrew Dye. Her offer of employment, from ARH New SWVC human resources, identifies her employer as "Appalachian Regional Healthcare." The offer states the position will be based in the "Clinic." (R. Ex. 13; Tr. 112).

Kacie Shadrick (office assistant) – hired to work with Wisman/McNeel as a "Physician Office Assistant," earning $12.50 per hour. Her position reports to Andrew Dye. Shandrick's offer of employment, from ARH New SWVC human resources, identifies the employer as "Appalachian Regional Healthcare" The offer states the position will be based in the "Clinic." (R. Ex. 18).

ii. The LPN and Medical Assistant Positions Are Covered By the CBA.

The LPN positions are expressly included as union positions in the CBA, so it is beyond question that the LPN positions in the Wisman/McNeel office would be union but for ARH's claim that they work for a different employer. (R. Ex. 3, Recognition Clause).

Similarly, the Physician Office Assistant positions are included in the CBA. Those positions are also known as medical assistants (MAs), and are designated in Appendix A, the CBA wage table, Grade 10. (Tr. 161, 212, 228; R. Ex. 3). The medical assistants' duties include tasks like checking patients in and out, checking their vital signs, looking at their medical history, inputting patient data into the computer system and calling in prescriptions. (Tr. 228). A recent union seniority list identifies numerous LPN and MA positions held by union members at Beckley ARH. (P. Ex. 7).

In addition, Julie Hodge confirmed that, based on her experience bargaining the CBA and her experience in the clinic, the five positions are positions that are covered by the CBA. (Tr. 237). Hodge also interacts with the Wisman/McNeel staff on nearly a daily basis. (Tr. 239).

iii. The Work Environments Are Identical.

Hodge testified that the Wisman/McNeel office is substantively identical to other doctors' offices at the SWVC. (Tr. 240). Hodge routinely visits all of the offices in the clinic due to her duties as an X-ray technologist. (Tr. 239-40).

iv. The Wisman/McNeel Office Is Next To Clinic Offices Staffed With Union Employees.

Hodge also confirmed that the only thing separating the Wisman/McNeel office from the rest of clinic is their office door. (Tr. 240-41). The Wisman/McNeel office is on the same floor as, and near, two union-staffed offices in the clinic (orthopedics and Dr. Blaine's office). (Tr. 185-86, 206; P. Ex. 1). Blaine's office is right across the hall from Wisman/McNeel's office. (Tr. 206).

v. All SWVC Clinic Employees Eat Lunch In Their Respective Offices.

ARH introduced evidence that the Wisman/McNeel staff do not mingle with other union employees at the SWVC during lunch. (e.g., Tr. 224). Hodge confirmed that there is no common break or lunch room at the SWVC and that union members eat lunch and take breaks in their respective doctors' offices as well. (Tr. 244-45). Thus, the Employer's proof highlights commonality.

vi. The Wisman/McNeel Phone System Is Integrated With ARH Offices.

Hodge testified that a phone call to her office (radiology) can be transferred to the Wisman/McNeel office. (Tr. 245-46). However, her office is unable to transfer a phone call to the tenant doctors' offices in the SWVC building. Instead, because those offices are not part of the ARH phone system, they can only give out the phone number to those wishing to call those offices. *Id.*

vii. The Positions In Question Are Paid By ARH.

ARH stipulated that both doctors and all five positions in question are paid by ARH. Thus, the five positions are paid by the same employer who pays the union staff members in other offices at the SWVC. (R. Ex. 3). ARH is stated on the paycheck. Primary Care Associates is only referred to by internal bookkeeping codes. (Tr. 138, 196-97).

viii. The Positions In Question Are Staffed By The Same Office That Staffs Union Positions.

Sue Thomas, the SWVC Human Resources Manager, issued all of the offers for the five positions. Similarly, her office issues offers for union positions as well. (Tr. 194; R. Ex. 16). Her office does not handle the hiring process for the tenant doctors. (Tr. 194).

Per the Wisman and McNeel employment contracts, ARH has the exclusive right to hire their staff. (R. Exs. 9-10).

ix. The Positions In Question Report To The Same Person Union Members Report To.

The job offers for the five positions all state that they report to Andrew Dye, who also administers the union contracts, oversees staff and administers discipline to union staff at the SWVC. (Tr. 167, 171, 178). Dye admitted that union staff come to him if they have issues with Wisman/McNeel's staff. (Tr. 181). Dye also acknowledged that any serious discipline of Wisman/McNeel's staff would have to go through the ARH human resources department. (Tr. 207).

In addition, Willie Redden testified:

> Q. Okay. Did you ever have any discussion with Andrew Dye regarding concerns about Dr. Wisman's office staff?
>
> A. Yes. I have a family member, my brother-in-law, who's a patient of Dr. Wisman, and I went up across the parking lot again, and I caught Andy and I said, "This is not a union matter. This is a [sic] official matter on my

family," and I told him that they had been trying to call and get appointment. My father-in-law -- I mean brother-in-law was real bad sick. My sister had called me and we've called and called. And I said, "Who's going to do the discipline?" I said, "Who's going to take care of this?" I said, you know –

And he said, "I discipline." And he said that he had had issues with them.

And then I said, "Well, you know, one of the things that really makes me mad is the person across the street is smoking all the time. You can't get in to get to see a doctor." And I said, "Andy, how do you want to handle this?"

And he said, "I will handle this."

And I said, "That's fine."

Q. All right. And when you mentioned the person across the street smoking all the time, were you in reference to one of Mr. Wisman's staff members?

A. Yes.

Q. And he said that he would take care of the problem?

A. Absolutely. Because I asked him specifically, "Who do you want me to go to," and he says he would.

Q. Okay.

A Come to him.

Q. Okay. Thank you.

A. And that's -- I usually go to Andy with all employee concerns.

(Tr. 267-68).

x. Facts Explaining Why Wisman/McNeel Staff Members Do Not Substitute In Other Clinic Offices

Wisman/McNeel staff do not fill in at union-staffed SWVC offices, and union SWVC staff do not fill in for the Wisman/McNeel staff. Dye confirmed that there can be no such interaction because it is prohibited by the CBA; non-union and union employees cannot perform the jobs of the other. (Tr. 178-79).

xi. The Pay Scales Are Close Or Identical.

The hourly rate for each of the five positions is stated in the respective job offers. (R. Exs. 12-15, 18). The non-union LPN-Clinic rate (Wisman/McNeel's office) is $13.62. The union LPN-Clinic rate is $13.62. (R. Ex. 3). The non-union medical assistant/physician office assistant rate is $12.50. The union rate starts at $12.20 and the maximum rate for the position is $15.82. (R. Ex. 3).

IV. ARGUMENT

A. The Employer's Basis For Requesting Review Is Not Covered By § 102.67(c).

The Regional Director determined that the CBA already covers the five positions at issue and thus dismissed the Unit Clarification Petition as moot. Underlying the Regional Director's decision are two conclusions. First, he concluded that the CBA defines the parameters of the bargaining unit by facility, not by physician groups. Second, he concluded that the evidence does not support the Employer's claim that Wisman/McNeel are a separate clinic or business entity. (Regional Director's Decision, p. 6). Those conclusions involve the application of law to fact and are legal conclusions. *See e.g., Thriftown, Inc. and Retail Clerks International Association, AFL-CIO,* 161 N.L.R.B. 603; 161 N.L.R.B. 603; (N.L.R.B. 1966) (determination of joint employer issue is a legal conclusion); *Krieger-Ragsdale & Company, Inc. and International Brotherhood of Bookbinders, AFL-CIO,* 159 N.L.R.B. 490, 499, 159 N.L.R.B. 490; (N.L.R.B. 1966) (the appropriateness of a unit is a legal conclusion).

Here, the Employer requests review under Section 102.67(c)(2), claiming that the Regional Director erred on a substantial factual issue and that the error prejudices the Employer. Primarily, the Employer argues that the Regional Director erred in concluding the CBA covers facilities, not physician groups, which is a legal conclusion.

The Employer also complains that the Regional Director did not perform an accretion analysis. However, that complaint is moot unless the Board first overturns the Regional Director's conclusion that the five positions are already a part of the existing bargaining unit. The Employer cites no law compelling the Regional Director to perform an accretion analysis in this matter once the Regional Director has concluded the positions are already part of the bargaining unit. As discussed herein, the Regional Director's decision in that regard is unassailable.

The Employer does not appear to take issue with any particular fact. Rather, the Employer simply wants another shot at winning before a different decision maker by arguing that the Regional Director erred in concluding that the Article 3 Recognition Clause covers facilities, not physician groups. The Employer's Request for Review must fail, as it does not fall within the parameters of Section 102.67(c).

B. ARH's Position Relies Upon Three Myths.

The Employer relies on not one, or two, but three critical fallacies in its quest for an accretion analysis. They are:

1) ARH claims that the CBA covers physician groups, not locations. However, there is express language in the CBA that states locations, not physician groups, are covered.

2) ARH claims that Drs. Wisman and McNeel formed Beckley ARH Primary Care Associates, and that it is not covered under the CBA. However, not a single document supports the creation of such an entity, and numerous facts show that Beckley ARH Primary Care Associates is nothing more than an ARH department.

3) ARH claims that the five affected employees are employed by Beckley ARH Primary Care Associates, not ARH. However, assuming Beckley ARH Primary Care Associates actually exists, the facts overwhelmingly show that ARH is the employer.

All three fallacies must be embraced by the Board in order to even consider an accretion analysis. Moreover, the Board would also have to conclude the Regional Director committed clear error in making his factual determinations.

C. The CBA Covers The Facility At 250 Stanaford Road.

Article 3 expressly states that ARH employees are covered at the listed "locations." Locations, not groups of doctors that can be changed, created and eliminated at will by ARH, are covered under the CBA.[8] The parties' intent and practice are clearly identified in the two LPN-Clinic postings. In those, ARH identified the "facility name for posting" as "SWVC." For posting into a position, it is the facility that is relevant.

Similarly, Article 13 – Seniority – of the CBA recognizes bargaining unit seniority by the length of time a member has worked at a "particular facility." (R. Ex. 3).

As discussed below, Wisman, McNeel and their staff are all ARH employees. Knowing that its claim that the five employees work for a different "business entity" would be exposed as a sham, ARH was compelled to find some other way to distinguish Wisman and McNeel. Thus, at the hearing it resorted to claiming that a department within the SWVC is exempt from the CBA if that department is not included in the "New Southern West Virginia Clinic" group of doctors. Ironically, the "New Southern West Virginia Clinic" group is not even referenced in the CBA.

To that end, Rocco Massey (for the Employer) testified that the building at 250 Stanaford Road has "always been referred to as the Southern West Virginia Clinic." (Tr. 33). When ARH purchased the building in 1995 there was a single group of physicians housed in the building,

[8] As an aside, it is not difficult to comprehend that the CBA can mention the name of a doctor as a shorthand designation of a facility. Obviously, the doctor himself/herself is not covered by the CBA, so clearly such a designation in the CBA means that either all employees who work for the doctor are covered, or the employees who work at the facility where the doctor works are covered. The CBA language and history between the parties quite plainly support the facility interpretation.

and that group's name was also the Southern West Virginia Clinic. He testified that ARH changed the name to "Beckley Medical Associates" after ARH acquired the building.

Massey testified that, after several years, ARH decided to divest itself of clinic employees and thus Beckley Medical Associates closed. However, Massey testified ARH later reopened the physicians' group as the "New Southern West Virginia Clinic" in the facility known as the "Southern West Virginia Clinic" in 2007. (Tr. 37-39).

Massey testified:

> Q. Does the Hospital draw a distinction between the practice group, ARH New -- the New ARH Southern West Virginia Clinic and the facility, Southern West Virginia Clinic?
>
> A. Yes. There is a definite distinction between them, between the two.

(Tr. 40). Thus, it is ARH's argument that this special group of doctors known as "New ARH Southern West Virginia Clinic" is covered by the CBA, but any other ARH doctor working at 250 Stanaford Road is not under the CBA. However, if Massey is to be believed, then the parties would have surely changed the name in the CBA to "New ARH Southern West Virginia Clinic." However, the 2013-2016 CBA only mentions Medical Associates (f/k/a Southern West Virginia Clinic). (R. Ex. 3).

The reasonable reading of the CBA is that all employees at the facility, regardless of the facility's name, are covered under the CBA. That is completely consistent with the bargaining history. It is also consistent with the language of Article 3 that ARH employees are covered at the identified "locations."

Since the inception of the CBA, ARH is unable to point to a single doctor's office at 250 Stanaford Road that has not been subject to the CBA. Only doctors who rent space from ARH and are not employees of ARH have been excluded from the CBA. This is demonstrated by the four doctors who currently lease space at SWVC (Amjad, Kabbara, Oye and Raj) (R. Ex. 5).

Those doctors merely lease space from ARH; the Petitioner has not objected to the fact that union members do not work in their offices.

Conversely, every SWVC doctor who has ever received an ARH paycheck has always been staffed with union employees. ARH can show no exceptions – until Wisman and McNeel. All history between the parties proves the CBA covers the SWVC facility, not discrete, balkanized practice groups in that facility. The current and former Local presidents, Redden and Hodge, testified that the CBA has always covered all employees at the facility, 250 Stanaford Road.

While ARH may use department names to track expenses and profitability, it fails to show the name "Beckley ARH Primary Care Associates" is more than a bookkeeping function. It is preposterous for ARH to argue that a wholly-owned ARH department is not covered by the contract merely because ARH chose to give the department its own name. There is no history that particular specialties or departments are excluded from the bargaining unit, and primary care has traditionally been a specialty included in the bargaining unit (e.g., Dr. Gunter in 2012).

D. "Beckley ARH Primary Care Associates" Is Not A Separate Legal Entity.

When it denied the Union's grievance over the failure to post the disputed positions, ARH claimed that the CBA does not apply because the positions work for a separate business entity that is not governed by the CBA. ARH claimed:

> These positions are part of a recently acquired physician practice that is operated by ARH as a separate business unit. As such, **Article 3 does not extend to this business entity.**

(R. Ex.17).

During the grievance process, ARH declined to even name "this business entity." At the January 8, 2014 hearing ARH finally divulged that "Beckley ARH Primary Care Associates" is the purported new employer which is not governed by the CBA. (e.g., Tr. 47; R. Ex. 5).

This should have been the easiest myth for ARH to substantiate. Regardless, the evidence adduced at the January 8, 2014 hearing proved there is one entity – ARH – not two. Letters, emails, contracts, leases, paychecks, tax documents and documents filed with the West Virginia Secretary of State showing the formation of a legal entity would all have been relevant to ARH's claim that it formed a separate business entity called Beckley ARH Primary Care Associates. It produced nothing but a few (literally) documents showing that ARH tracks the income and expenses of Wisman/McNeel for accounting purposes.

ARH now asks the Board to believe that merely because ARH says these two doctors are "called" Primary Care Associates (Tr. 49) that ARH is suddenly absolved of its obligations under the CBA. The fact is, the documents ARH produced at the January 8, 2014 hearing prove beyond doubt that there is no separate "business entity" called Beckley ARH Primary Care Associates. There are no documents creating a separate business or entity.

E. ARH Is Clearly The Employer.

The issue here is not complex – who is the employer? ARH set the stage by claiming that it is not the employer. Taking ARH at its word, the Union petitioned for clarification. The unit clarification procedure is a neutral one, in which the Board will also decide single employer and unit determination issues. *See, e.g., Valmac Indus., Inc.*, 225 N.L.R.B. 1296 (1976); *General Envelope Co.*, 222 N.L.R.B. 10 (1976); *Miami Indus. Trucks, Inc*., 221 N.L.R.B. 209 (1975).

"[T]he Board has indicated strong support for the use of UC proceedings to resolve unit scope as well as unit placement issues, particularly when the use of these proceedings

will be more expeditious and will obviate the need for unfair labor practice proceedings. *Armco Steel Co.*, 312 NLRB 257 (1993)." An Outline Of Law And Procedure In Representation Cases, N.L.R.B., p. 131 (Aug. 2012).

Here, the Union sought unit clarification due to the likely "single employer" issue presented by ARH. That is, if the Regional Director had concluded that two employers are, in fact, a single employer for purposes of the Act, and the employees share a sufficient community of interest, then the unrepresented employees would have been accreted into the existing bargaining unit.[9]

The Petitioner's plan to deal with the single-employer issue was derailed by the revelation that Beckley ARH Primary Care Associates is not a separate business or employer. However, even if the Board assumes, *arguendo*, that a separate business entity exists, the admitted facts clearly show that ARH, not Beckley ARH Primary Care Associates, employs the five positions. Regarding the five positions, ARH:

i. Hires the employees;

ii. Determines the rate of pay;

iii. Pays the employees;

iv. Disciplines the employees;

v. Reserves the exclusive right to fire the employees;

vi. Controls the employees' conduct;

vii. Controls, in excruciating detail, the conduct of Wisman and McNeel, including the right to terminate the doctors;

viii. Reaps the profits from the services rendered by the employees, and

[9] Petitioner prepared for the January 8, 2014 hearing ready to explore the "single employer" issue, eliciting information showing that the new "business entity" and ARH have the same address, same governing board, same corporate structure, same leadership, same ownership, etc. However, the balance of the evidence demonstrates that there simply are not two employers to even discuss, rendering the single employer issue moot.

ix. Supplies the equipment and space for the employees to perform their jobs.

There is no credible argument ARH can present to prove that it is not the employer. ARH is the employer and the CBA thus covers to these positions.

As the Employer and contract signatory, ARH must have a legitimate reason to separate these positions from the bargaining unit. However, ARH does not assert that the positions have undergone changes since their inclusion in the bargaining unit that justify its actions. ARH does not claim any new and previously undiscovered evidence impacts the unit placement of these LPN and MA positions. ARH is bound by its agreement and cannot challenge the unit placement following its voluntary stipulation (see Article 3, CBA) to inclusion in the unit. See *Premier Living Center,* 331 NLRB 123 (2000). No viable claim can be made that these positions are not already included in the bargaining unit.[10]

F. Where The Contested Positions Already Perform The Duties Of Bargaining Unit Positions, An Accretion Analysis Is Unnecessary.

At the hearing, ARH made a passing attempt to distinguish the duties of Azure Spain, one of the non-union LPNs. She testified that she is uniquely qualified to use a "Medi-Port," a skill normally not possessed by an LPN. (Tr. 153). The Employer, however, failed to establish that as a required element for her position and also failed to offer evidence that other ARH LPNs lack the same skill.[11] ARH's meager effort to distinguish the duties of the five positions from existing union classifications ended there.

[10] Accordingly, the inordinate amount of time ARH spends discussing the desires of its hand-selected employees, who are clearly biased as they might be adversely affected by enforcement of the CBA's posting process, is entirely moot. However, *Melbet Jewelry Co*., 180 NLRB 107 (1969), debunks the Employer's claim that the employees' wishes control here.

[11] As such, Petitioner's counsel objected to the relevance of the testimony.

Regardless, where an employer claims a position has changed, unit clarification is the appropriate mechanism to determine the issue. As stated by the Tenth Circuit, "Finally, we believe any changes, subsequent to the original election, in the job responsibilities of the radiologic technologists and respiratory therapists are more appropriately addressed in a unit clarification proceeding authorized under 29 C.F.R. § 102.60 (1988). *See NLRB v. Magna Corp.*, 734 F.2d 1057, 1061 (5th Cir. 1984) (unit clarification appropriate when job responsibilities have changed). To hold otherwise would allow employers to nullify unfavorable elections simply by modifying the job responsibilities of a particular position." *St. Anthony Hosp. Sys. v. NLRB*, 884 F.2d 518, 524 (10th Cir. 1989).

What is apparent, even highlighted by the Medi-Port testimony, is that the LPN and MA positions fundamentally have not changed. LPNs and MAs at the SWVC perform substantially the same work, whether they are in the Wisman/McNeel office or in another office in the facility.

This case is substantively identical to cases where the employer creates a new classification, claiming the CBA does not apply, when, in reality, the employer has done little more than change the name of an existing union position. In such cases, an accretion analysis is inapplicable. **Instead, the Board has declared that such positions simply belong, or remain, in the bargaining unit.** *Premcor, Inc.*, 167 LRRM 1118, 333 NLRB 164 (2001); *Developmental Disabilities Institute, Inc.*, 334 NLRB 1166, 168 LRRM 1292 (2001) ("Once it is established that a new classification is performing the same basic functions as a unit classification historically had performed, the new classification is properly viewed as belonging in the unit rather than being added to the unit by accretion.").

The Petitioner asked the Regional Director to declare that the five positions belong in the bargaining unit without resorting to an accretion analysis (contrary to the Employer's repeated

claim that the Union asked for an accretion). As discussed below, an accretion analysis would still achieve the inclusion of these positions in the bargaining unit. However, here the Employer's main goal was to circumvent the posting requirements of the CBA. An accretion determining that these particular employees are part of the bargaining unit would still achieve the Employer's goal. Thus, the Employer would have successfully devised a mechanism for evading the CBA's posting provisions.

The Petitioner encourages the five employees who currently hold these positions to apply for the positions once the positions are clarified into the bargaining unit. However, current bargaining unit members should at least have the opportunity to apply for those positions as well. They have been denied that right to date and an accretion of the current five individuals would further that injustice.

G. Even If The Board Treats This As An Accretion, Clearly A Sufficient Community of Interest Exists.

Under the well-established accretion standard, the Board has found a valid accretion when the additional employees have little separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share a community of interest with the preexisting unit to which they are accreted. See *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1271 (2005); *E. I. Du Pont, Inc.*, 341 NLRB 607, 608 (2004), quoting *Ready Mix USA, Inc.*, 340 NLRB 946, 954 (2003).

Community of interest factors in this case are overwhelming. Comparing the five positions to positions already included in the bargaining unit:

i. The job titles and duties are the same. The Employer was unable to show any meaningful differences in job duties (and, in fact, the Employer has never argued that was the reason they were excluded from the unit).

ii. The work environments are identical.

iii. The offices are in immediate proximity to each other.

iv. All SWVC clinic employees eat lunch in their respective offices, so the Wisman/McNeel staff are identically situated.

v. The Wisman/McNeel phone system is integrated with ARH offices.

vi. The Wisman/McNeel office uses the same computer system as union employees.

vii. The Wisman/McNeel office uses the same billing procedures as union offices.

viii. All employees have the same employer and are paid by ARH.

ix. The union and non-union positions are all hired by the ARH human resource department.

x. The positions in question report to the same person union members report to (Andrew Dye, who also administers the CBA).

xi. ARH can discipline and fire all employees.[12]

xii. The pay scales are close or identical.

xiii. There is interaction between the staff members. The only reason union employees do not fill in for the Wisman/McNeel staff (and vice versa) is because of the CBA. Thus, to the extent there is a lack of interaction, it is manufactured by ARH.

Under an accretion analysis, the five positions clearly show a community of interest. *Safeway Stores*, 256 NLRB 918 (1981).

If anything, given the fact that they have the same employer, same classifications and same duties, this matter appears to be a situation where the Employer bears the burden of

[12] Subject to the CBA provisions for union members.

showing such dissimilarity in the new positions that it is justified in removing them from the bargaining unit. *Illinois-American Water Co.*, 296 NLRB 715 (1989), *enfd.* 933 F.2d 1368 (7th Cir. 1991).

V. CONCLUSION

ARH argues that Wisman and McNeel have autonomy and that their office is a self-governing "entity." One need look no further than the employment contracts to reach the accurate, and opposite, conclusion. As the Petitioner pointed out to the Regional Director, for all of the protest and proof offered by ARH, these doctors are no better situated than are well-paid indentured servants. Indeed, they are even bound to ARH through non-compete clauses. They are going nowhere, and have little or no control over their situation or their staff.

Moreover, the notion that these doctors and their staff work for a separate entity, "Beckley ARH Primary Care Associates," is nothing more than that – a notion. At best, Primary Care Associates is a department within ARH. Both doctors and their staff members work exclusively for ARH. There is no separate entity.

The Employer must show that the Regional Director committed clear error on a factual issue. The conclusions contested by the Employer are legal, not factual, conclusions. Even so, every aspect of the Regional Director's decision is supported by overwhelming evidence. That the Regional Director did not agree with the Employer's position is of no moment.

Accordingly, the Union respectfully submits that the Employer's Request for Review must be denied.

Respectfully submitted,

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Dated April 14, 2014

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically with the National Labor Relations Board and served electronically to the following on this 14th day of April 2014:

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